ORIGINAL

No. 89-1771 (2)

IN THE

Supreme Court of the United States

October Term, 1990

STATE OF NORTH CAROLINA;
ATTORNEY GENERAL OF NORTH CAROLINA,
Petitioners,

v.

SAINT LUKE GREGORY, JR.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does admission of a hearsay statement wholly devoid of contemporaneous objective corroborative evidence and otherwise lacking sufficient particularized guarantees of trustworthiness, violate a criminal defendant's rights under the confrontation clause?

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The above named Respondent, does hereby request the Court deny the petition for writ of certiorari filed on behalf on the State in Saint Luke Gregory, Jr. v. State of North Carolina, et al., _____F.2d____ (4th Cir., April 4, 1990) affirming Saint Luke Gregory, Jr., v. L.E. Cherry et al, Civil 87-424-NC, unpublished (E.D.N.C., November 14, 1988).

STATEMENT OF THE CASE

Saint Luke Gregory was indicted on September 24, 1984 in Pasquotank County, North Carolina for three felony charges: (1) attempted first degree rape, (2) incest, and (3) taking indecent liberties with a minor child, all arising out of one event which allegedly occurred on September 7, 1984.

Prior to trial, the state trial court conducted a competency hearing in order to determine the reliability of the alleged victim, LaTonya, the three and one-half year old daughter of Saint Luke Gregory. At the hearing the trial court determined LaTonya to be incompetent as a witness. Saint Luke Gregory proceeded to trial upon pleas of not guilty. The state presented no eyewitness testimony as LaTonya did not testify. Instead, both the evidence of sexual assault and the evidence linking Gregory to the assault were presented through the testimony of LaTonya's grandmother, Doris Griffin; LaTonya's treating physician, Dr. Green; and, certain test results admitted into evidence. At the trial, though Gregory did not himself testify, he offered exculpatory evidence on his behalf. The jury convicted on all three charges and Gregory was sentenced to imprisonment for ten (10) years on the attempted first degree rape and for a consolidated consecutive sentence of ten (10) years on the remaining two charges.

Gregory appealed his convictions to the North Carolina Court of Appeals which affirmed those for attempted first degree rape and taking indecent liberties. The court vacated judgment

and reversed the conviction on the count of incest due to insufficiency of the evidence as there was no evidence of any carnal intercourse. 78 N.C. App. 565, 338 S.E. 2d 110 (1985). Since the trial court had aggregated at sentencing the charges of incest and taking indecent liberties with a minor, the appellate court remanded the latter charge for resentencing.

Gregory petitioned the North Carolina Supreme Court for discretionary review. While awaiting the court's decision to accept his case for review, Gregory was resentenced on March 5, 1986, to five (5) years imprisonment on the indecent liberties conviction. On April 7, 1986, the North Carolina Supreme Court denied certiorari. 316 N.C. 382, 342 S.E. 2d 901 (1986)

Gregory commenced this action by a pro se application for writ of habeas corpus in the United States District Court for the Eastern District of North Carolina, filed May 20, 1987, Civil 87-424-HC.

Gregory raised in this action the claims denied at the state appellate level. The Attorney General of North Carolina filed an answer on October 17, 1987 moving for dismissal. The requirement of exhaustion with regard to the issues presented was unconditionally waived by the Attorney General. For purposes of preparation of written brief and oral argument before federal magistrate Wallace W. Dixon, James R. Parish, an attorney licensed to practice before the Eastern District was appointed to represent Gregory.

Oral arguments were heard before the federal magistrate on March 10, 1988. The issue argued, by counsels' agreement and

court order, was Gregory's claim that his rights of confrontation were violated by the trial court's admission of three hearsay statements, to wit: (1) the "June" statement of LaTonya's to her grandmother; (2) one made September 7 from LaTonya to her grandmother; (3) one made the same day to Dr. Green.

By memorandum of October 7, 1988, Magistrate Dixon recommended issuing the writ on the grounds that admission of each of the three hearsay statements violated Gregory's rights to confrontations. The state filed objections and Judge James C. Fox, United States District Court Judge for the Eastern District accepted in part and rejected in part on November 14, 1988, the magistrate's recommendation. He ruled only admission of the "June" statement constituted a confrontational violation, "inasmuch as there is absolutely no objective corroborative evidence of the abuse reported at the time."

The state appealed on December 12, 1988 to the United States Court of Appeals for the Fourth Circuit which affirmed in an opinion filed April 4, 1990, _____F.2d_____ No. 89-7514. The Court of Appeals agreed that admission of the "June" statement violated Gregory's confrontational rights since there was no contemporaneous evidence to corroborate the statement and that other evidence was "chronologically distant" presenting "a logically insufficient index of the reliability of the "June" hearsay."

The State petitioned the United States Supreme Court for a writ of certiorari.

STATEMENT OF THE FACTS

Saint Luke Gregory was charged and convicted of three sexual offenses - attempted first degree rape, incest and indecent liberties with a minor - arising from an act allegedly occurring on September 7, 1984. (not 1982 as stated in Government's Statement of Facts.) The alleged victim was his three and a half year old daughter LaTonya.

Prior to trial, the state trial court held a competency hearing in order to determine her reliability as a witness. At the hearing, LaTonya admitted that she would "tell things that did not happen." She felt this was "telling the truth." At the hearing LaTonya failed to describe the conduct by petitioner that would indicate he sexually attacked her. Further she testified that not only did she make up things about her father but that she enjoyed doing so. Based upon these statements, and others, the trial court determined LaTonya to be incompetent and unreliable as a witness. Thus the state presented its case primarily through the testimony of LaTonya's grandmother (Doris Griffin); LaTonya's treating physician (Dr. Green); and certain test results.

In September of 1982, Mr. Gregory, LaTonya and an uncle tested positive for gonorrhea. This evidence was admitted at trial under North Carolina Rules of Evidence 404(b) as a prior bad act for purposes of identification. Some three to four months prior to the September 7, 1984 statement LaTonya was delivered by her father, Gregory, to the grandmother's house on

his way to work as was the custom. LaTonya entered the house and said "Grandmama, my daddy pooted in my butt." [1]Doris Griffin told her to "shut up." Mrs. Griffin noticed nothing suspicious in the child's appearance or conduct. There was no complaint of pain or discomfort. There was no examination. Prior to September 7, 1984, the matter was never discussed again. The Court of Appeals for the Fourth Circuit noted that from the record Doris Griffin "seems to have dismissed the remark as a naive impertinence."

On September 7, 1984 Gregory dropped LaTonya off at Griffin's home and proceeded to work as he had been doing for most of the child's life. Later in the morning while preparing the child for her bath the grandmother observed LaTonya's panties contained a thick, milky, or yellowish liquid. Mrs. Griffin asked LaTonya about this and LaTonya told her grandmother "Daddy put it in my butt." The child pointed to her front. During the September 7th telling, LaTonya was crying. Doris Griffin (not Mrs. Dixon as State's Statement of Facts indicate) took her to Dr. Green who both questioned and examined LaTonya. The physical examination revealed irritation and soreness though lab test revealed no sperm or gonorrhea.

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[1]At trial the grandmother testified that "June" statement "My daddy pooted in my butt," was made about four months before September 7.

Further the examination did not reveal penetration by an object the width of a penis.

The trial court admitted the three hearsay statements of LaTonya.

The Federal District Court Judge and Fourth Circuit ruled inadmissible the first one --- the "June" Statement -- due to total lack of corroborative factors at the time of the declaration and the absence of reliable corroborative evidence chronologically close enough to positively affect the reliability of the statement.

These facts show the "June" statement inadmissible under the Confrontation Clause and the court conducted a proper harmless error analysis.

REASONS WHY THE WRIT SHOULD NOT ISSUE

This case presents a question of the constitutional propriety of introducing into evidence a hearsay statement wholly devoid of any contemporaneous corroborative features and lacking other sufficient particularized guarantees of trustworthiness.

The district court accepted the reviewing federal magistrate's recommendation that it rule inadmissible the "June" hearsay statement finding "absolutely no objective corroborative evidence of the abuse reported at that time."

The Court of Appeals, in affirming the district court's decision finding a violation under the Confrontation Clause,

reasoned the record contained "no corroborating evidence peculiar to the "June" statement" and the "chronologically distant evidence presented in this case to be a logically insufficient index of the reliability of the "June" hearsay."

The Fourth Circuit's ruling is thoroughly consistent with the requirements of "particularized" guarantees of reliability enunciated by Ohio v. Roberts, 448 U.S. 56 (1980) and is not inconsistent with the two other circuits as is claimed by the state.

Under the egis of Ohio v. Roberts, supra. at 66, a hearsay statement is admissible "only if it bears adequate 'indicia' of reliability. Reliability can be inferred where the evidence falls within a firmly rooted hearsay exemption. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." The circuit courts dealing with reliability of the declarant make the assessment based both in light of the circumstances at the time of the declaration and the perceived credibility of the declarant. See United States v. Renville, 779 F.2d. 430, 440 (8th Cir. 1985)("[T]he reliability of the declarant is assessed in light of the circumstances at the time of the declaration and the credibility of the declarant. see also United States v. Dorian, 803 F.2d 1439, 1444 (8th Cir. 1986) (quoting Renville); Huff v. White Motor Corporation, 609 F.2d 286, 292 (7th Cir. 1979); United States v. Nick, 605 F.2d 1199 (9th Cir. 1979).

The State argues, incorrectly, the Fourth Circuit has made contemporaneity talismanic of its search for particularized

guarantees of reliability. This is not the case; for the court reasoned that even without requiring contemporaneous corroboration the reliable evidence in this case was so chronologically distant as to be "a logically insufficient index of reliability" for the "June" statement.

The Court in Ohio v. Roberts, supra. requires an analysis that is factually specific to each case which the federal magistrate, district court and Fourth Circuit painstakingly conducted all with the same conclusion as to the "June" statment: that it lacked particularized guarantees of trustworthiness and therefore its admission violated the confrontation clause. Certainly where the declarant is found by the examining trial judge to be incompetent due to, inter alia, her willingness to fabricate about her father, there exists a greater requirement for strong contemporaneous indicia of truthfulness and reliability. The record is devoid of any reference in time of the alleged abuse claimed in the "June" statement. Additionally there exists no indication of the child's first opportunity to speak of the alleged abuse. The facts utterly fail to reveal any corroborative evidence from the declarant's demeanor to substantiate her assertion.

In the instant case there was absolutely no physical evidence to support the statement. No physical examination was conducted. No discomfort by the child was observed by the grandmother. No complaint was made by the child.

As noted by the Magistrate in his recommendations, the child's unreliability at trial does raise an inference that she

was unreliable at the time of the declaration. She admitted she made up stories about her father and the trial court found her unable to tell the truth with consistency. "Clearly," the magistrate wrote "therefore, [the child's] unreliability at the time of the statment must weigh in the balance against admissibility. "(J.A. 71-72) Further, her statements at her competency hearing diminish her reliability. At the hearing she admitted she did not tell the truth, lied about her father, made up stories about him, and enjoyed doing so. (J.A. 107, 111) A declarant ruled incompetent for the reasons stated by the state trial judge is an unreliable communicator of the facts. See Huff v. White Motor Corporation, supra. Incompetency for these reasons, unlike immaturity or "trial frights", impacts negatively on the reliability of the witness.

Lastly, the child's language describing the event is not graphic. Circuit courts have inferred veracity from the graphic language used by the child. e.g. Morgan vs. Foretich, 846 F.2d 941 (4th Cir. 1988), United States v. Nick, supra. In this case however, the language is vague and during the competency hearing trial the terminology used and its meaning were constantly disputed due to lack of clarity. Further, despite the terminology, the child had consistently pointed to her front rather than her posterior. (J.A. 130, 131, 108, 126, 128).

The court painstakingly analyzed evidence not contemporaneous to the statment, e.g. evidence of gonorrhea two years earlier, in determining the presence or absence of sufficient evidence of reliability. The court decided the

record was devoid of any evidence of abuse between 1982 and September 1984 and concluded the 1982 incident insufficient evidence to corroborate the "June" statement. The court declined to hold the chronologically distant 1982 incident and the September 1984 statement as sufficient particularized guarantees of trustworthiness to render the "June" 1984 statement reliable.

Finally the Fourth Circuit reasoned they could not say the admission of the "June" hearsay was harmless beyond a reasonable doubt. Coy v. Iowa, 487 U.S. 1012 (1988) states the harmless error standard of Chapman v. California, 386 U.S. 18 (1967) applies in cases revealing violations of the Confrontation Clause.

In its brief the state claims the opinion of the Fourth Circuit conflicts with the Seventh and Eighth Circuits in the cases Nelson v. Farrey, 874 F.2d 1222 (7th Cir. 1989) and United States v. Dorian, 803 F.2d 1439 (8th Cir. 1986). A cursory reading of those cases reveals the fallacy of this claim. Under Ohio v. Roberts, 448 US 56 (1980), the court promulgated a rule allowing the admission of hearsay evidence from an unavailable declarant if the evidence comes within a well recognized exception to the hearsay exclusion or, if not, that the evidence bears "particularized guarantees of trustworthiness" Id. at 66. In Nelson v. Farrey, supra. the hearsay statements of the child declarant were testified to by a clinical psychologists who treated her. The evidence was admitted under the well recognized exception of Rule 803(4), statements made for the

purposes of medical diagnosis. Similarly in United States v. Dorian, supra. the hearsay was evaluated by the courts and admitted pursuant to Rule 803(24), the residual clause after satisfying the five criteria; one of which was trustworthiness. In United States v. Dorian, supra. the courts cite Reville, supra. recognizing that the search is for indicia of reliability at the time of the declaration and the credibility of the declarant.

Further, in Dorian, that court spoke specifically of significant features corroborative of the girl's statements: her graphic description of the incident (lacking in our case); the defendant washing only the child's underwear the date of the incident which was an act unique in the annals of the marriage (lacking in our case); the mother's statements shortly after the incident that the defendant was trying to rape their daughter (lacking in our case); the child-declarant's disturbed behavior only days after the incident when told she would be returning to the home but the behavior disappearing when she learned the father would not be present (lacking in our case). Thus, in both cases cited as representing a conflicting view amoung the circuit courts, both of those courts following the strictures of Ohio v. Roberts, supra. ruled the hearsay statements admissible under specifically enumerated hearsay exceptions and thus could be inferred reliable. The court in Dorian went further in its analysis to point out corroborative facts. In the instant case, the courts ruled the "June" statement did not fall within a firmly rooted hearsay exception and, therefore, carried out the

alternate search, mandated by Ohio v. Roberts, for evidence of particularized guarantees of trustworthiness. Rather than reflecting a conflict amoung the circuit courts, the three cases represent the two different evaluations mandated by Ohio v. Roberts, supra.

In short, the conflict claimed to exist by the state is baseless and appears to have been made solely to secure a granting of the Writ.

CONCLUSION

For the reasons noted above there is no sufficient reason to issue a writ of certiorari: the well reasoned opinion of the Fourth Circuit should stand.

This the 13th day of June, 1990.

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FILING AND MAILING CERTIFICATE OF PRINTER

I hereby certify that on this 13th day of June, 1990, I filed with the Clerk's Office of this Court the required copies of this document and further certify that I mailed this same date from Richmond, Virginia the required copies to opposing counsel.

The necessary filing and mailing was performed in accordance with the instructions given me by counsel in this case.

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